

City & DOC v. COBA, 61 OCB 42 (BCB 1998) [Decision No. B-42-98 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration	:
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-between-	:
	:
THE CITY OF NEW YORK and the	:
DEPARTMENT OF CORRECTION,	:
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Petitioners,	:
	:
-and-	:
	:
CORRECTION OFFICERS BENEVOLENT	:
ASSOCIATION,	:
	:
Respondents.	:
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Decision No. B-42-98  
Docket No. BCB-1969-98  
(A-7171-97)

**DECISION AND ORDER**

On April 1, 1998, the Department of Correction and the City of New York (hereinafter referred to as “Department,” “D.O.C.” or “City”), appearing by its Office of Labor Relations (“OLR”), filed a petition challenging the arbitrability of a grievance that is the subject of a request for arbitration filed by the Correction Officers Benevolent Association (“COBA” or “Union”). The Union filed its answer on April 21, 1998. The City filed its reply on May 11, 1998.

**BACKGROUND**

Martina Surrency-Seignious (“Greivant”), is employed by the Department of Correction in the title of Correction Officer (“C.O.”). On September 3, 1997, grievant left duty because of an injury and began the use of sick leave. On September 22, 1997, grievant was given a return to duty date of September 24, 1997 by the Department’s Health Management Division (“H.M.D.”).

However, grievant was unable to return to duty on that date and continued on sick leave as permitted by Directive 2262. During the grievant's sick leave period, the grievant was required to visit H.M.D. for doctor's appointments and to drop off documentation. The Union alleges that "the real reason was to harass grievant for sick leave usage." On December 6, 1997, grievant returned to full duty.

On December 1, 1997, the Union filed two Step I grievances on behalf of the grievant, alleging both a violation and misapplication of Directive 2262, § VIII(E). The subject of Directive 2262 is "Sick Leave Regulations for Members of the Uniformed Force." Section VIII reads, in pertinent part:

**Returns to Duty**

A. A member of the uniformed force who has reported sick shall not return to duty until ordered to do so by an H.M.D. physician, physician's assistant, registered nurse, or the H.M.D. Scheduling Unit.

B. A member of the uniformed force who has reported sick must call the H.M.D. Scheduling Unit within 24 hours from the time he/she reported sick to the H.M.D. Sick Desk. The member shall report the following:

1. Name, rank, shield number, and command.
2. Specific description of illness or symptoms.

C. If the member has visited his/her personal physician within this period and obtained a return to duty date, he/she shall then request approval from the H.M.D. Scheduling Unit for a return to duty.

The H.M.D. Scheduling Unit may approve the member's return to duty or schedule the member to see an H.M.D. physician. The H.M.D. Scheduling Unit may request that completed medical documentation form(s) be presented at or forwarded to H.M.D.

D. If the member has not visited his/her personal physician within this period, the H.M.D. Scheduling Unit may schedule the member to see an H.M.D. physician.

E. When a uniformed member has been given a return to duty date by H.M.D. and is subsequently unable to return to duty, that member must comply with Section II A. Additionally, the uniformed member will report to H.M.D. on the original date given as a return to duty date for the purpose of medical evaluation. Should the member be too ill to report to H.M.D., he/she must call his/her command immediately.

F. A uniformed member on sick leave remains on sick leave until he/she is returned to duty by H.M.D. . .

The grievance stated that grievant had been requested to appear at H.M.D. 21 times in a period of

approximately three months. On December 4, 1997, the Deputy Warden in Command of the H.M.D. responded to the grievances. The letter stated that a review of both grievances reveals that they pertain to the same issue, “namely the medical evaluation of Officers who continue sick.” It also stated that only eleven of grievant’s visits were scheduled due to continued sick status. The others were for “routine re-visits, [to] obtain additional medical documentation and second opinion evaluation.” It also states that “[a]s both grievances indicate Directive 2262 mandates that any employee who continues sick shall report to the Health Management Division on the date given as the return to duty date.”

On December 11, 1997, a Step II grievance was filed by the Union. The Assistant Commissioner for the DOC responded to the grievance. The response stated that “the Department is within its right to order officers to the Health Management Division.” On December 26, 1997, a Step III grievance was filed by the Union. It was responded to on January 26, 1998. On February 3, 1998, the Union filed a Request for Arbitration (“RFA”). The grievance to be arbitrated was stated as. “H.M.D. has exercised its authority to order Correction Officers on sick leave to report for a medical examination in an abusive and harassing manner. For example, H.M.D. ordered CO Martina Surrency-Seignious to report over 21 times, some of which were on consecutive days, for examination of the same injury.” Directive 2262 is listed as the rule or regulation which the Union claims has been violated.

### **City’s Position**

The City argues that in order to show a nexus between the act complained of, the number of times the grievant had to visit an H.M.D. doctor, and Directive 2262, the Union must show that the

Directive limits the number of times a doctor may examine a correction officer on sick leave. However, the City contends, the Directive puts absolutely no limits on the number of times the Department may examine a correction officer to determine whether they are able to return to duty. Thus, having failed to show that the Directive limits the number of times the Department may require a sick C.O. to visit an H.M.D. doctor, the Union has failed to demonstrate the requisite nexus between the act complained of and the source of the alleged right, redress of which is sought through arbitration.

### **Union's Position**

The Union contends that the City “misapprehends” the grievance as alleging only a violation of Directive 2262, and neglects to address the misapplication of the Directive. It also argues that the City is essentially arguing that the absence of a specified number of appointments means that H.M.D. has “carte blanche” to order a C.O. in every day. “Not only is this a stretch,” it contends, “it is more an argument to the merits of the grievance and makes little sense as a challenge to arbitrability.” COBA argues that the nexus derives from the Directive’s numerous, explicit references to when H.M.D. appointments may occur and the fact that the Directive does not explicitly give H.M.D. carte blanche to schedule appointments every day. The Union then lists a review of grievant’s H.M.D. appointments so that the Board may “appreciate the abuse of power that occurred here.” The Union lists 23 dates between September 5, 1997 and November 18, 1997, (a period of approximately 105 days) where grievant was required to report to H.M.D.

### **DISCUSSION**

When a request for arbitration is challenged by the City, initially, this Board must determine

whether the parties are in any way obligated to arbitrate controversies and, if they are, whether the act complained of by the Union is arguably related to the cited provision of the parties' agreement.<sup>1</sup> It is well established that it is the policy of the NYCCBL to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.<sup>2</sup> We cannot create a duty to arbitrate where none exists, however, nor can we enlarge a duty to arbitrate beyond the scope established by the parties.<sup>3</sup>

In this case, there is no dispute that the parties have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement, nor is it denied that alleged violations of departmental rules, regulations or procedures affecting terms and conditions of employment are within the scope to arbitrate.

Directive 2262, the provision cited in the Union's RFA, deals with the rules and regulations governing sick leave procedures for members of the uniformed force. In this situation, it is incumbent upon COBA to show how Directive 2262 is related to its claim. Although the City argues that there is no explicit limit in the Directive on the number of times a Correction Officer may be called in to H.M.D., the Union argues that there is question of whether calling in an employee to H.M.D. as often as the grievant has been required to report constitutes a possible misapplication of the Directive.

We believe that the Union's contention establishes the requisite nexus. The fact that the

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<sup>1</sup> Decision Nos. B-7-98; B-19-89; B-65-88; B-28-82.

<sup>2</sup> *See, e.g.*, Decision Nos. B-35-89; B-41-82; B-15-82; B-19-81; B-1-75; B-8-68.

<sup>3</sup> Decision Nos. B-41-82; B-15-82.

Directive contains no limitation on the number of required appearances may be dispositive of the issue of any “violation” of the Directive, but the definition of a grievance in the parties’ collective bargaining agreement also includes a “misapplication” of the Directive. As our inquiry must end with the question of whether the Union has established an arguable nexus between the subject of the grievance and the substance of the parties’ collective bargaining agreement, we leave a discussion of the merits of the case to an arbitrator.

**ORDER**

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby,

ORDERED, that the petition challenging arbitrability filed by the City of New York, be and the same hereby is, denied; and it is further

ORDERED, that the request for arbitration filed by the Correction Officers Benevolent Association be, and the same hereby is granted.

Dated: New York, New York  
September 28, 1998

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STEVEN C. DeCOSTA  
CHAIRMAN

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DANIEL G. COLLINS  
MEMBER

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GEORGE NICOLAU  
MEMBER

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SAUL G. KRAMER  
MEMBER

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RICHARD A. WILSKER  
MEMBER

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ROBERT H. BOGUCKI  
MEMBER

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THOMAS J. GIBLIN  
MEMBER

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